

The preliminary hearing order should be reversed.

Claimant alleges she injured her right knee while working for the respondent on July 26, 1996. However, claimant also contends she did not know she had sustained a work-related injury until after seeing a medical specialist on October 21, 1996. On October 22, 1996, claimant first notified respondent of the accident.

Because claimant failed to provide notice to respondent within 75 days of the accident, respondent contends K.S.A. 44-520 bars claimant's right to receive benefits for this injury. The Appeals Board agrees.

Claimant first argues that respondent should have known about the accidental injury because claimant showed several coworkers her swollen knee and later took several days off due to her knee. Claimant also argues she should not have been required to provide notice of accident until October 21, 1996, when she allegedly first realized she had sustained a compensable injury. In support of the latter argument, claimant cites Angleton v. Starkan, Inc., 250 Kan. 711, 828 P.2d 933 (1992) where the court held the time limitations for written claim do not apply until the death of a worker is either ascertained or is reasonably ascertainable.

Regarding claimant's first argument, the Appeals Board finds that claimant has failed to prove respondent had actual knowledge of the accident. In this instance, respondent's knowledge that claimant was off work and seeing a physician for her leg does not establish or rise to the level of actual knowledge of a work-related accident.

Regarding claimant's second argument, the Appeals Board finds that the principles set forth in Angleton do not apply. First, claimant's argument that she did not realize she had sustained an injury on July 26, 1996, is not supported by the evidence. To the contrary, claimant testified how on the date of alleged accident her initial moderate pain progressed until it had become more serious. Also, claimant testified her knee began swelling on the date of the incident and she displayed the swelling to some of her coworkers. Claimant further testified she knew the pain she was experiencing in her knee was different from the normal aches and pains she experienced from working because it did not resolve in one or two days. Second, despite the opportunity, the court in Angleton avoided overruling Rutledge v. Sandlin, 181 Kan. 369, 310 P. 2d 950 (1957). In Rutledge the court held the statutory time to file for compensation ran from the date of accident regardless of when the resulting injury was discovered. Instead of overruling Rutledge, the Angleton court restricted its holding to certain limited situations. If Rutledge had been overruled, claimant's argument would be much more compelling.

The notice statute, K.S.A. 44-520, provides:

"Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10

days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

As the notice statute provides, there are three instances when an injured worker may have more than 75 days to provide notice of accident. Those instances are: (1) when the employer has actual knowledge of the accident, (2) the employer was unavailable to receive the notice, and (3) the employee was physically unable to provide such notice. The evidence fails to establish any one of those three situations existed in this proceeding.

Based upon the above, the Appeals Board finds that claimant failed to provide respondent with timely notice of accident, which bars claimant's right to receive benefits. Therefore, the issue whether claimant sustained personal injury by accident arising out of and in the course of her employment with the respondent is rendered moot.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing order dated January 29, 1997, entered by Administrative Law Judge Robert H. Foerschler should be, and hereby is, reversed and that claimant is denied her request for benefits.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

c: Graydon S. Price, Kansas City, MO
Stephanie Warmund, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director